3-565

Jan'y 8 1877
motion to Dismiss
Submitted

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 540.

THE WESTERN UNION TELEGRAPH COMPANY, PLAINTIFF IN ERROR,

vs.

JONATHAN ROGERS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

Dismissed 5000

FILED OCTOBER 29, 1875.

Dismissed

SUPREME COURT OF THE UNITED STATES.

No. 540.

THE WESTERN UNION TELEGRAPH COMPANY, PLAINTIFF IN ERROR,

vs.

JONATHAN ROGERS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

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1 Pleas before the Hon. John F. Dillon, judge of the circuit court of the United States for the eighth judicial circuit & district of Nebraska, and the Hon. Elmer S. Dundy, judge of the district court of the United States for the district of Nebraska, sitting in said circuit court at the term of May, 1875.

Be it remembered that on the 29th day of September, 1873, a transcript was filed in said circuit court, which said transcript is in words and figures following, to wit:

STATE OF NEBRASKA,
County of Lincoln, ss:

Pleas before the honorable Samuel Maxwell, judge of the district court of said State for said county, at a term hereof held at North Platte, in said county, on the 23rd day of September, 1873.

JONATHAN ROGERS
vs.
THE WESTERN UNION TELEGRAPH CO.

Be it remembered that on the 16th day of August, 1873, Jona-
2 than Rogers filed in the said court his petition, as follows:

JONATHAN ROGERS, PLAINTIFF,
against
THE WESTERN UNION TELEGRAPH COMPANY,
defendant.

In the third judicial district court of the State of Nebraska, within and for Lincoln County.

Petition.

The said Jonathan Rogers complains of the said Western Union Telegraph Company, defendants, as follows:

That from the 1st day of December, 1872, up to the present time, said defendants have been a corporation, doing business in the State of Nebraska, under the aforesaid name.

That before, to wit, for twenty-one years before & at the time of the committing of the injury hereinafter mentioned, there was, & from thence hitherto has been, a certain public highway for the free passage of all persons on foot, & with their teams, horses, wagons, carriages, & horseback at all times. And yet the defendant, well knowing the premises, heretofore, on the 22nd day of December, 1872, wrongfully caused to be dug a hole about three feet deep by one foot across for the purpose of placing a telegraph-pole therein, in the wagon-track of the public high-
way running from the town of North Platte, in said county, near
3 the Union Pacific Company's railroad-track to the ford and bridge near & at said railroad company's line of railroad at the crossing of the North Platte River in said county, & wrongfully & negligently left said hole opened & unfilled from the aforesaid time, *to* the 22nd day of December, 1872, when the same was dug, up to the 10th day of April, 1873, whereby the said plaintiff, lawfully passing in and along said highway & wagon-track at dark, was then and there, by reason of said hole being left open & unguarded & protected, & his horse, which he was riding, stepping into said hole, so left open, with great violence thrown from his horse without the fault or negligence of the plaintiff,

& said plaintiff was thereby greatly & permanently injured by his thumb being put out of joint so that it could not be replaced, & his ankle sprained, & severe bruises externally over his person generally, & permanent internal injuries, whereby said plaintiff suffered extreme & excruciating pain, whereby the plaintiff was put to great expense in employing physicians, & has been unable to attend to his usual business from said injury up to the present time, & as plaintiff believes, for life, & suffers great anguish, to the damage of plaintiff in the sum of $10,000\frac{00}{100}$, ten thousand dollars.

Wherefore plaintiff prays judgment against the said defendant
4 for the said sum of ten thousand dollars with interest from date, his said damages so as aforesaid sustained.

(Signed) JONATHAN ROGERS,
By B. I. HINMAN, *His Attorney.*

STATE OF NEBRASKA,
Lincoln County, ss:

Jonathan Rogers, being duly sworn, says that he is plaintiff in the aforesaid action; that he has read the foregoing petition & knows the contents thereof; that he believes the facts therein stated to be true.

(Signed) JONATHAN ROGERS.

Subscribed in my presence & sworn to before me this 16th day of August, 1873.

[SEAL.] (Signed) JAMES BELTON,
Clerk of District Court.

(Endorsed:) Jonathan Rogers vs. The Western Union Telg. Co. Petition. Filed in this office the 16th day of August, 1873. Signed, James Belton, clerk of the district court.

And on said day a summons issued out of said court in said action, which was as follows:

THE STATE OF NEBRASKA,
Lincoln County, ss:

5 The people of the State of Nebraska to the sheriff of said county:

You are commanded to notify the defendant, the Western Union Telegraph Company, that it has been sued by Jonathan Rogers for ten thousand dollars damages, and interest on the same from the date of this summons and costs of this action, in the district court of said county; that unless it answer by the 15th day of September, A. D. 1873, the petition of the said plaintiff against it filed in the clerk's office of said court, such petition will be taken as true & judgment rendered accordingly.

You will make due return of this summons on the 25th day of August, A. D. 1873.

Witness my signature & the seal of said court at North Platte this 16th day of August, A. D. 1873.

[SEAL.] (Signed) JAMES BELTON, *Clerk.*

(Endorsed:) Doc. . Page . District Court, Lincoln County. Jonathan Rogers vs. The Western Union Telegraph Company. Summons. Amount claimed of the defendant by the plaintiff is $10,000, & interest from August 16th, 1873, & costs of this action. B. I. Hinman, plffs. atty. Returned and filed August 25th, 1873.

(Signed) JAMES BELTON, *Clerk.*

And on the 16th day of August, 1873, the sheriff of said county
6 returned said summons with endorsements thereon as follows:

Received August 16, 1873, and hereby certify that I served the within by leaving a copy at the office & last usual place of business of said defendants in said county, & delivering said copy with P. J. Gilman, their managing agent in said county, on the 16th day of August, 1873.

(Signed) WM. WOODHURST, *Sheriff*,
By S. FRIEND, *Deputy*.

And on the 11th day of September, 1873, the said defendants filed petition in said cause as follows:

In the district court, Lincoln County.

JONATHAN ROGERS
vs.
THE WESTERN UNION TELEGRAPH COM.

To the honorable court above named:

The petition of the Western Union Telegraph Company respectively shows to the court:

1. That a suit has been brought in this court against your petitioner by Jonathan Rogers, who is a citizen of this State, for recovery of the sum of ten thousand dollars, ($10,000.)

2. That the matter in dispute exceeds as aforesaid the sum or value of five hundred dollars, ($500.00,) exclusive of costs.

3. That your petitioner, at the time of filing this his petition, has entered his appearance in this court in the said suit.

7 4. That your petitioner is not a citizen of the State in which the above-entitled action is brought, but is a citizen of another State, to wit, the State of New York, under and in pursuance of whose laws it is a corporation duly organized & incorporated.

5. That your petitioner has procured, & herewith offers, good and sufficient surety for his entering in such court, on the first day of its session, copies of the process against him in the said cause, pursuant to the statutes of the United States in such case made and provided.

Your petitioner therefore prays that the said cause may be removed for trial into the next United States circuit court to be held in the district where the same is pending, to wit, into the next circuit court for the district of the State of Nebraska, pursuant to the provisions of the said statute of the United States made and provided, & that this court do accept the surety offered by your petitioner as aforesaid, & do proceed no farther in the said cause. And that this court would give all proper directions, & grant to your petitioner such other or further order or relief in the premises as may be just.

8 (Signed) WESTERN UNION TELEGRAPH CO.,
By J. M. WOOLWORTH, *its Attorney*.

STATE OF NEBRASKA,
County of Douglas, ss:

W. B. Hibbard, being duly sworn, says he is the superintendent of the petitioner in above petition, & the facts stated in above petition are true.

(Signed) W. B. HIBBARD.

Subscribed in my presence & sworn to before me this 3rd day of September, 1873.

[SEAL.] (Signed) C. R. WOOLWORTH,
Notary Public.

(Endorsed:) In the district court. Lincoln County. Jonathan Rogers vs. The Western Union Telegraph Company. Petition to remove. J. M. Woolworth, deft.'s atty. Filed in this office the 11th day of September, A. D. 1873. James Belton, clerk of the district court.

And on said day said defendant filed bond in said cause as follows

Bond.

Know all men by these presents that we, the undersigned Western Union Telegraph Co., of the city & State of New York, & John A. Creighton, of the State of Nebraska, are hereby held & firmly bound
9 unto Jonathan Rogers, his executors, administrators, & assigns, in the sum of three hundred dollars, $300, lawful money of the United States of America, to be paid to the said Jonathan Rogers, his executors, administrators, or assigns, for which payment, well and truly to be made, we jointly and severally bind ourselves, our heirs, executors, & administrators, & every of them, forever, by these presents, sealed with our seals this 3rd day of September, in the year of our Lord 1873.

Whereas the above-named Jonathan Rogers hath commenced a suit in the district court of the State of Nebraska, for the county of Lincoln, against the above-bounden Western Union Telegraph Company, for the recovery of ten thousand dollars, $10,000.00, & the matter in dispute in such suit exceeds as aforesaid the sum of five hundred dollars ($500.00) exclusive of costs;

And whereas the said Jonathan Rogers, the plaintiff in the said suit, is a citizen of the State of Nebraska, & the said Western Union Telegraph Company, the defendant therein, is a citizen of another State, to wit, the State of New York;

And whereas the said Western Union Telegraph Company hath entered its appearance in such suit in the said district court & hath filed its petition in the same court for the removal of the said cause
10 for trial into the next circuit court to be held in the district where the said suit is pending, to wit, into the next United States circuit court to be held in the district of Nebraska pursuant, to the statutes of the United States in such case made and provided:

Now, therefore, the condition of the above-written obligation is such, that if the above-bounden Western Union Telegraph Company shall enter into the said circuit court, on the first day of its next session, copies of the process against him in the aforesaid cause, & shall also then and there appear & enter special bail in the said cause, if special bail was originally required therein, then these presents & the above-written obligation shall be void; but otherwise to be & remain in full force and virtue.

(Signed) THE WESTERN UNION TELG. CO.,
By W. B. HIBBARD, *Supt.*
JOHN A. CREIGHTON.

Bond approved this 11th day of September, A. D. 1873.

JAMES BELTON,
Clerk of the District Court.

(Endorsedment:) In the district court, Lincoln County. Jonathan Rogers vs. The Western Union Telegraph Company. Bond. J. M.

Woolworth, deft.'s atty. Filed in this office this 11th day of September, A. D. 1873. James Belton, clerk of the district court.

11 And on the 23rd day of September, 1873, at a regular term of said court, the said court made an order in said cause as follows:

JONATHAN ROGERS
vs.
WESTERN UNION TELEGRAPH CO.

This cause came on to be heard upon the petition of the said defendants for removal thereof out of this court into the next United States circuit court for the district of Nebraska, & on motion of J. M. Woolworth, attorney for said defendants, it is ordered that the said cause be removed accordingly, & the said defendants give bond, with sureties to be approved by the court, in the penal sum of $300.00, conditioned according to law; which is done.

STATE OF NEBRASKA,
County of Lincoln, ss:

James Belton, clerk of the district court of said State for said county, do hereby certify that the above are true copies of all the papers filed & orders made in above-entitled cause in & by said court as the same appears of record in my office.

Witness my hand & seal of said court this 23rd day of September, 1873.

[SEAL.] JAMES BELTON, *Clerk.*

12 Upon said transcript appear the following endorsements: No. 293 B. Circuit court, district of Nebraska. Jonathan Rogers vs. The Western Union Telegraph Company. Transcript. J. M. Woolworth, deft.'s atty. Filed September 29, 1873. Watson B. Smith, clerk.

Thereupon, afterwards, at the November term of said court, and on the 17th day of November, 1873, the following proceedings were had in said case, as appears of record on folio 496, journal B of said court, to wit:

J. ROGERS
vs.
THE WESTERN UNION TELEGRAPH COMPANY. } 293 B.

Ordered, that the defendant have 30 days to answer to the merits of said plaintiff's petition, & this cause to stand continued.

Thereupon, afterwards, to wit, on the 21st day of February, 1874, an answer was filed in said case, which said answer is in words and figures following, to wit:

In the United States circuit court, district of Nebraska.

JONATHAN ROGERS
vs.
THE WESTERN UNION TELEGRAH CO.

Answer.

13 Now comes the said defendant, by J. M. Woolworth, its attorney, & for answer denies that at the time of the alleged accident in said petition mentioned, or at any other time, there was a public high-

way at the place where the said alleged accident occurred for the free or other passage of all persons either on foot or with their teams or horses or wagons or carriages or on horseback, at all or at any time or times, but says that the same was the property of the Union Pacific Railroad, upon & over which the said defendant had an easement for right of way for the construction & maintenance of their telegraph-line; and it denies that it wrongfully or negligently left open or unguarded or unprotected the hole in said petition described, or any hole, or that said plaintiff had any right to pass or was lawfully passing along said place at the time or in the manner in said petition alleged; and says that the said alleged accident was caused by the fault & negligence of said plaintiff passing where he had no right to pass, and where he was a trespasser upon the rights and property of said railroad co. & said defendant. And it denies that he suffered injury or damage in any way or in any sum by reason of said alleged accident whereof
14 he can complain of this defendant.

J. M. WOOLWORTH,
Deft.'s Atty.

STATE OF NEBRASKA,
County of Douglas, ss:

Frank Lehmer, being duly sworn, says he is agent of the defendant in above answer, and he believes that the facts stated therein are true.

F. LEHMER.

Subscribed in my presence & sworn to before me this 20th day of February, 1874.

[SEAL.] ALBERT M. HENRY,
Notary Public in & for Douglas County, Neb.

Upon the back of said answer appear endorsements, in words and figures following, to wit: 293 B. U. S. circuit court. Jonathan Rogers vs. W. U. Tele. Co. Answer. J. M. Woolworth, deft.'s atty. Filed Feb'y 21, 1874. Watson B. Smith, clerk.

Thereupon, afterwards, to wit, on the 18th day of March, 1874, a motion was filed in said case, which said motion is in words and figures following, to wit:

In the circuit court of the United States for the district of Nebraska.

15 JONATHAN ROGERS
vs.
THE WESTERN UNION TELEGRAPH COMPANY. } 293. B. Motion.

Now comes the said plaintiff, Jonathan Rogers, by his attorneys, & move' the court to strike from the files the defendant's answer filed herein, for the reason that said answer was filed out of time, & without leave of the court; & said plaintiff asks that a default be entered against defendant.

REDICK & FERGUSON,
Plff.'s Attys.

Upon the back of said motion appear endorsements in words and figures following, to wit: 293 B. U. S. circuit court. Jonathan Rogers vs. The Western Union Telegraph Company. Motion. Filed March 18, 1874. Watson B. Smith, clerk. Redick & Ferguson, plff.'s attys.

Thereupon, afterwards, to wit, on the 4th day of May, 1874, a reply was filed in said case, which said reply is in words and figures following, to wit:

In the United States circuit court, district of Nebraska.

16 JONATHAN ROGERS, PLFF.,
vs.
THE WESTERN UNION TELEGRAPH COMPANY, deft. } Reply.

1st. Now comes the said plaintiff, by John I. Redick and B. I. Hinman, his attorney', and deny that said defendant had an easement for right of way for the construction and maintenance of their telegraph-line at the place where said injury was incurred by plaintiff.

Plaintiff denies that the said alleged accident was caused by the fault or negligence of said plaintiff passing where he had no right to pass or where he was a trespasser upon the right or property of said railroad company or said defendant; but that, on the contrary, he as well as all of the public had the right by long use of said road as a public highway; that the public had used said highway as such for a long period of time, to wit, for twenty-six years, by permission of said railroad company and without objection, interruption, or dispute of their right to use the same by any person or persons, corporation, or the United States.

That plaintiff and the public had the further right to use said road by a dedication of the same for a public highway by said Union
17 Pacific Railroad Company for a period long previous to the digging of said hole and said injury to plaintiff thereby, and an acceptance and continued use of the same previous to the digging of the same and up to the present time. That said plaintiff, and the community and public, had the further right to use said travelled highway by the same having been duly declared and ordered such by the board of county commissioners of Lincoln County, State of Nebraska, at a public meeting duly and legally assembled on the 5th day of April, A. D. 1867, pursuant to which the public have constanly used the same ever since said order, without objection or hindrance from any one, and that said order has not been reversed or rescinded, nor has said road been since vacated by any act whatever.

That since the year A. D. 1866 and up to the present time said defendant and Union Pacific Railroad Company have each had public offices in the town of North Platte, the former for the transmission and reception of telegraph-messages for the public in general and especially for the settlers immediately east of said railroad-bridge, and said railroad company for passengers and transmission, receipt, and delivery of freight to the community at large and especially for the last-named settlers.
18 That said settlers east of said bridge had no other travelled way nor any way by which to reach said offices and transact their business with said companies, excepting by travelling said road, without trespassing upon said railroad company's and other persons' lands; and said company*s* invited and held out inducements for the public and settlers east of said bridge to come over the said travelled way and transact their business at their said offices, and said railroad company kept the said road open for that purpose, and this had no offices within a convenient distance to said settlers east of said bridge on North Platte for said purposes.

That said settlers east of said river and plaintiff were settlers and

colonists invited by said railroad company to settle upon their lands and lands adjacent to the same, and to travel over said travelled way to reach the same; and, as a further inducement for them to use the same, planked their bridge over said North Platte River for the use of teams, wagons, horsemen, and footmen to cross upon and use, and said
19 bridge was a part of and continuation of said way; and, as a further inducement to travel said way they permitted footmen to cross said bridge ever since its erection in A. D. 1866, and, for a long time previous to its being planked, carried building-materials and other freights and passengers from North Platte to the east side of said bridge for building purposes free of charge, because the river-ford was difficult to cross, and said plaintiff was erecting a building for one of said settlers so transported and was travelling from the construction of the same to his residence in North Platte, having crossed said bridge to said way on foot; it being the only travelled way he had the right to or could travel upon for that purpose.

JOHN I. REDICK, AND
B. I. HINMAN,
Att'ys for Plaintiff.

STATE OF NEBRASKA,
Lincoln County, ss:

Jonathan Rogers, being duly sworn, says that he is plaintiff in said action; that he has read the foregoing reply and knows the contents thereof; that he believes the facts therein stated to be true.

JONATHAN ROGERS.

20 Subscribed in my presence and sworn to before me this 27th day of April, A. D. 1874.

W. S. PENISTON,
U. S. Commissioner.

Upon the back of said reply appear endorsements, in words and figures following, to wit: No. 293 B. U. S. circuit court. Jonathan Rogers vs. W. U. Tel. Company. Reply. Filed May 4, 1874. Watson B. Smith, clerk. B. I. Hinman & John I. Redick, plff.'s atty.

Thereupon, afterwards, at the May term of said court, and on the 13th day of May, 1874, the following proceedings were had in said case, as appears of record on folio 565, journal B of said court, to wit:

JONATHAN ROGERS
vs. } 293 B.
WESTERN UNION TELEGRAPH CO.

This cause came on to be heard on the motion of the defendant herein to strike out part of the reply of said plaintiff, and was argued
21 to the court by the attorneys for the parties herein.

Whereupon it is ordered by the court, the same being fully advised in the premises, that said motion be and the same is denied.

Thereupon, afterwards, at the May term of said court, and on the 8th day of May, 1875, the following proceedings were had in said case as appears of record on folios 243, 244, & 248, journal C of said court, to wit:

JONATHAN ROGERS
vs.
WESTERN UNION TELEGRAPH CO. } 293 B. Trial.

This case this day came on to be tried to the court and to a jury, whereupon came—

1. Alexander McCombie,
2. D. Pierce,
3. B. A. Hall,
4. Wm. Gertes,
5. Chas. Harkinson,
6. W. Z. Taylor,
7. L. Huber,
8. Luther Poland,
9. Curtis Coder,
10. Wm. H. Doolittle,
11. Nathan H. Shaw,
12. R. L. Miller,

good and lawful men from the body of the circuit and district of Nebraska, who were duly empannelled and sworn to try the issue joined.

22 The said jury, having heard the evidence adduced, the arguments of counsel, and the charge of the court, retire to their room under the charge of a bailiff, for that purpose specially sworn, to consider of their verdict.

Whereupon the said jury returned into court and presented to the court their verdict, which is in words and figures following, to wit:

JONATHAN ROGERS
vs.
THE WESTERN UNION TELEGRAPH CO. } Verdict.

We, the jury empannelled and sworn in the above-entitled cause, do find for the plaintiff, and assess his damages at five thousand ($5,000\frac{00}{100}$) dollars.

BENJN. A. HALL,
Foreman.

23 JONATHAN ROGERS
vs.
THE WESTERN UNION TELEGRAPH CO. } 293 B.

Now comes said plaintiff, by his attorneys, Messrs. Redick and Hinman, and moves the court for judgment on the verdict herein.

Whereupon it is considered and adjudged by the court that said plaintiff, Jonathan Rogers, have and recover of and from said defendant, the Western Union Telegraph Company, the sum of five thousand ($5,000.00) dollars and the costs of this suit, taxed at two hundred twenty and $\frac{33}{100}$ ($220\frac{33}{100}$) dollars, and that he have execution therefor.

Thereupon, afterwards, to wit, on said 8th day of May, 1875, a bill of exceptions was filed in said case, which said bill of exceptions is in words and figures following, to wit:

24 In the United States circuit court, district of Nebraska.

JONATHAN ROGERS
vs.
THE WESTERN UNION TELEGRAPH CO. }

Be it remembered that on the trial of this cause before the Hon. John F. Dillon and a jury, the plaintiff, to maintain the issues on his part,

proved that long before the organization of the Union Pacific Railroad Company there was a way travelled by the public where the accident complained of occurred; that it had ever since been used by the public generally, with the knowledge of and without objection from said company; that the said way leading to the town of North Platte ran along the said company's railroad-track and about fifty feet therefrom, the same being within and upon the right of way, granted said company by Congress; that the said defendant dug said holes in said way for its telegraph-poles about one foot and a half square & four feet deep, which it abandoned without filling up and constructed its line about ten
25 feet from said abandoned holes, nearer the railroad-track. This was all the proof on the way being a public highway; and thereupon the said judge instructed the jury that for the purposes of this action a public highway was sufficiently shown. That the defendant had no right to dig & leave holes open in a road generally travelled by the public, and in doing so was guilty of negligence & liable for damages sustained in consequence thereof by a person falling therein who was himself guilty of no negligence.

To which the defendant, then and there in presence of the jury, duly excepted, and prays the court to sign and seal this his bill of exceptions, which is done this 8th day of May, 1875.

JOHN F. DILLON, *Judge.*

Upon the back of said bill of exceptions appear endorsements, in words and figures following, to wit: 293 B. Jonathan Rogers vs. Western Union Telegraph Company. Bill of exceptions. Filed May 8, 1875. Watson B. Smith, clerk.

26 Thereupon, afterwards, to wit, on the 14th day of May, 1875, a writ of error was allowed in said case and a citation issued therein, of which the following are the original writ and citation, to wit:

27 UNITED STATES OF AMERICA,
District of Nebraska, ss:

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Nebraska, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you between Jonathan Rogers, plaintiff, and the Western Union Telegraph Company, defendant, a manifest error hath happened, to the great damage of the said defendant in the said cause, as by its complaint appears:

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of October next, in the said Supreme Court to be then there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws and custom of the United States, shall be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court of the United States, at Omaha, in said district, this 14th day of May, 1875.

WATSON B. SMITH, *Clerk.*

Allowed by—

ELMER S. DUNDY,
District Judge and Presiding in the Circuit Court.

(Indorsed:) No. 293 B. United States circuit court, district of Nebraska. Jonathan Rogers vs. The Western Union Telegraph Co. Writ of error. Filed May 14, 1875. Watson B. Smith, clerk.

28 THE UNITED STATES OF AMERICA,
District of Nebraska, ss:

To Jonathan Rogers, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Nebraska, wherein the Western Union Telegraph Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, at Omaha, this 14th day of May, 1875.

ELMER S. DUNDY,
Presiding in the Circuit Court for said District.

(Indorsed:) No. 293 B. United States circuit court, district of Nebraska. Jonathan Rogers vs. Western Union Telegraph Co. Citation. Filed May 15th, 1875. Watson B. Smith, clerk.

Service of within citation admitted this 15 day of May, 1875.

J. I. REDICK,
Of Counsel for Plff.

29 Thereupon, afterwards, to wit, on said 14th day of May, 1875, a bond was filed in said case, which said bond is in words and figures following, to wit:

Know all men by these presents that we, the Western Union Telegraph Company, are held and firmly bound unto Jonathan Rogers in the full and just sum of ten thousand dollars, to be paid to the said Jonathan Rogers, his certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this 14th day of May, in the year of our Lord one thousand eight hundred and seventy-five.

Whereas lately, at a circuit court of the United States for the district of Nebraska, in a suit depending in said court between Jonathan Rogers, plaintiff, and the Western Union Telegraph Company, defendant, a
30 judgment was rendered against the said Western Union Telegraph Company, and the said Western Union Telegraph Company having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid

IN THE

Supreme Court of the United States.

No. 540.

THE WESTERN UNION TELEGRAPH CO.

vs.

JONATHAN ROGERS.

Error to the Circuit Court of the United States for the District of Nebraska.

Brief of Counsel for Defendant in Error on motion to dismiss.

Defendant in error brought an action for damages against plaintiffs in error and obtained a verdict and judgment for five thousand dollars. The plaintiffs in error seek to have the case re-examined here. But the act of 1875 limits the jurisdiction of this court to cases wherein the matter in dispute *exceeds* five thousand dollars. In construing the language in the act 1789, when the amount was two thousand dollars, in the case of Walker vs. The United States, 4 Wall., p. 163, the court say: "The act of Congress limits the jurisdiction to cases where the matter in dispute *exceeds* two thousand dollars. We can no more take jurisdiction when the matter does not exceed than when it is less than that sum."

MONTGOMERY BLAIR,

DECEMBER, 1876. *for Defendant in Error.*

Supreme Court of the United States.

OCTOBER TERM, 1876.

No. 540.

THE WESTERN UNION TELEGRAPH COMPANY,
PLAINTIFF IN ERROR,

vs.

JONATHAN ROGERS.

MOTION TO DISMISS.

Brief for Plaintiff in Error.

The judgment was as follows: "It is considered and adjudged by the Court that said plaintiff, Jonathan Rogers, have and recover of and from said defendant, The Western Union Telegraph Company, the sum of *five thousand* ($5,000) *dollars and the costs of this suit, taxed at two hundred and twenty and* $\frac{33}{100}$ (220\frac{33}{100}$) dollars, and that he have *execution therefor.*"

The question upon the present motion is, whether this is not in fact and law a judgment for $5,220$\frac{33}{100}$, and therefore for an amount greater than five thousand dollars?

The costs are here ascertained, taxed, and liquidated at 220\frac{33}{100}$; and this is part of the aggregate amount for which judgment is rendered and execution awarded, and which, therefore, exceeds the jurisdictional amount of five thousand dollars.

It is quite inconceivable that a writ of error would be dismissed in a case where the damages amounted to five thousand dollars, or less, and the costs, as taxed, and included in the judgment, amounted to, say, *ten thousand* dollars, or any other very large sum.

The principle applicable to the matter is, of course, not affected by the amount of the costs included in the judgment.

Here is a small record of eleven or twelve pages, and the plaintiff's costs have been taxed at $\$220\frac{33}{100}$; and if such a judgment is not reviewable by this Court under the act of 1875, it is not very easy to see how a party will ever be able to obtain relief against excessive and abusive costs in any case where the damages included in the judgment amount to five thousand dollars, or a less sum.

There can be no taxation of costs, except under the act of February 26, 1853, which repealed absolutely all previous laws on the subject, and regulates the amount recoverable as legal costs of suit by the successful party. (Lyell *v.* Miller, 6 McLean, 422; The Liverpool Packet, 2 Sprague, 37.)

Any taxation of costs in violation of this act (known as the Fee Bill) is error, cognizable by this Court.

The 3d section of the act of 1853 (now Rev. Stats., sec. 983) provides that the bills of fees of the clerk, marshal, and attorney, &c., shall be taxed in conformity with the act, and "*shall be filed with the papers in the case.*"

Where the costs are taxed and liquidated prior to or at the time of the entry of the judgment, and constitute a part of the judgment as rendered, and the whole judgment, including the damages and costs, is for a *definite* amount, greater than $5,000, this Court, we submit, has jurisdiction, under the act of 1875, although the damages recovered may be less than $5,000.

Very often costs are not actually *taxed* until after the judgment is rendered; and any general judgment for costs,

without fixing the *amount*, would be interpreted to mean *legal* costs.

In such a case the judgment, to the extent of the costs, would not be reviewable in this court.

The case of *Walker* v. *United States*, (4 Wall., 163,) cited by defendant in error, was a judgment for "the sum of $2,000, with *interest* thereon," &c.; and the court held that in determining the jurisdictional sum, *interest* on the judgment could not be considered, because interest on a judgment can only arise *after* rendition, while the jurisdictional amount, if determined by the judgment, is fixed at rendition.

Here there is a definite judgment for $5,000+$220.33 for costs; and for that aggregate amount ($5,220$\frac{33}{100}$) execution is awarded against the defendant, now plaintiff in error.

G. P. Lowrey,
J. Hubley Ashton,
Of Counsel for Plaintiff in Error.